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PURCHASE FOR VALUE WITHOUT NOTICE.

IT seems to have been a common opinion in early times that a court of equity would give no assistance against a purchaser for value without notice.[1]

But, in Phillips *v.* Phillips[2] (1861), which at once became, and has since continued to be, the leading authority upon this subject, this doctrine, which Mr. Sugden strenuously defended to the last,[3] was definitively rejected. Lord Westbury, in his opinion, arranged the cases in which the plea of purchase for value would be a bar to equitable relief in three classes: (1) When an application is made to the auxiliary jurisdiction of the court. As illustrations under this class were mentioned bills for discovery and bills for the surrender of title-deeds belonging to the plaintiff. (2.) Where one who purchased an equitable interest in property, without notice of a prior equitable incumbrance of the plaintiff, has subsequently got in the outstanding legal title. This was the doctrine of *tabula in naufragio.* (3.) When a plaintiff seeks to charge a purchaser with "an equity as distinguished from an equitable estate, as, for example, an equity to set aside a deed for

[1] Stanhope *v.* Verney, 2 Eden, 81, 85, per Lord Henley; Jerrard *v.* Saunders, 2 Ves., Jr. 454, per Lord Loughborough; Wallwyn *v.* Lee, 9 Ves. 24, per Lord Eldon; Payne *v.* Compton, 2 Y. & C. Ex. 457, per Lord Abriger; Attorney-General *v.* Wilkins, 17 Beav. 285, per Sir John Romilly; Gomm *v.* Parrott, 3 C.B., n. s. 47.

[2] 4 D., F., & J. 208.

[3] Sugden, V. & P. (14 ed.) 791–798.

fraud, or to correct it for mistake." On the other hand, to a bill invoking the concurrent or exclusive jurisdiction of equity against a subsequent equitable incumbrancer, purchase for value without notice would be no defence.

It will be noticed that one common case of protection to a purchaser, namely, where one buys a legal title from a misconducting trustee without notice of the trust, does not come within any of Lord Westbury's three classes. Furthermore, the discrimination in his third class between an equity and an equitable estate is an unfortunate one, for two reasons. In the first place it is an attempted distinction between convertible terms. Every equity attaching to property is an equitable estate. The equity of a defrauded vendor is no less an equitable estate than the interest of *cestui que trust.* Indeed, the fraudulent vendee is constantly called a constructive trustee. Secondly, this distinction has led to a misconception as to Lord Westbury's real opinion. He has been thought to include in his third class all purchasers, even those who have not acquired from the fraudulent vendee the title of the defrauded vendor ; [1] and yet it is quite clear that he would have protected those purchasers only who had completed their purchase.[2]

By far the most satisfactory discussion of this subject is contained in Mr. Langdell's "Summary of Equity Pleading." The conclusions of the learned author coincide in the main, save as to the doctrine of *tabula in naufragio,* with those of Lord Westbury. But he has explained, with great clearness, the *rationale* of the doctrine of purchase for value without notice. Mr. Langdell, however, it is hardly necessary to say, was dealing primarily with the subject of equity pleading. His examination of this doctrine as a part of the law of property was incidental and professedly incomplete. Any discrepancies, therefore, that may

[1] 2 White *v.* Tudor, L. C. Eq. (6 ed.) 23; Haynes, Defence of Purchase, Chap. III. *See also* Cave *v.* Cave, 15 Ch. D. 639, 647–9, per Fry, J.

[2] In Eyre *v.* Burmester, 10 H.L.C., 90, M made a legal mortgage to A, and then, suppressing A's mortgage, mortgaged the property to B. B having subsequently discovered A's mortgage, M, by fraudulent representations, induced A to reconvey to himself. No further conveyance was made to B. In a contest between A and B, A prevailed. Lord Westbury said, p. 104: "If B had advanced money to M on the faith of the release and M's actual possession of it, but without taking a conveyance, he might have had a lien on the deed itself; but, this interest being equitable only, would still, in my opinion, have been subject to the superior equity of A." This was said five months after the decision in Phillips *v.* Phillips.

seem to exist between his views and those of the present writer may be attributed, with possibly one or two exceptions, to an extension of the principles stated in the "Summary" rather than to any real divergence of opinion.

The principle as to purchase for value, which it is the object of these pages to justify, may be concisely stated as follows: A court of equity will not deprive a defendant of any right of property, whether legal or equitable, for which he has given value without notice of the plaintiff's equity, nor of any other common-law right acquired as an incident of his purchase. In all other cases the circumstance of innocent purchase is a fact of no legal significance.

The rule just given is simply an application of that comprehensive principle which lies at the foundation of constructive trusts and other equitable obligations created by operation of law (including implied or *quasi* contracts, which are really equitable liabilities, upon which the common law assumes to give a remedy), namely, that a court of equity will compel the surrender of an advantage by a defendant whenever, but only whenever, upon grounds of obvious justice, it is unconscientious for him to retain it at another's expense. Indeed, it is not too much to say that the purchaser of a title from one who holds it subject to an equity is always charged, if chargeable at all, as a constructive trustee. If he acquired the title with notice of another's equity his acquisition was dishonest, and he must, of course, surrender it. If he gave no value, though his acquisition was honest, his retention of the title, after knowledge of the equity, is plainly dishonest.[1] If he gave value, and had no notice of the equity, it is eminently just for him to keep what he has got.

It will be convenient to discuss, separately, the three classes of rights, before-mentioned, which a defendant may have acquired, namely: (1) legal rights of property, (2) equitable rights of property, and (3) other common-law rights, and then to consider

[1] It is sometimes said that a volunteer has constructive notice of prior equities. But this is a perversion of the term notice. If a volunteer should, before actual notice of any equity, dispose of the title by gift, surely no claim could properly be made against him. Yet, if he had constructive notice, he would be liable for a wrong analogous to a breach of trust. If, again, a donee should sell the property, and subsequently buy it back, he could keep the property, though he would have to account for the proceeds of his sale; whereas, if he had constructive notice, he could not keep the property. Ames, Cas. on Trusts, 532.

the cases where the defendant derives no benefit from the circumstance that he is an innocent purchaser; and, finally, to examine the so-called doctrine of *tabula in naufragio.*

I. The typical case of protection of an innocent purchaser is the case where the defendant has bought a legal title from a fraudulent trustee or vendee.[1] No distinction is to be made between the purchaser of land and the purchaser of a chattel.[2] Nor is it essential that the innocent purchaser obtain the entire legal interest in the property, either in quantity or duration. The purchaser of an aliquot part of the estate, the grantee for value of a rent charge,[3] or the lessee for value, may keep the interest actually acquired from the fraudulent legal owner.

Closely akin to a lessee's right is the interest of a pledgee. His right is a legal right *in rem*, and fundamentally different from the lien of an equitable incumbrancer, which is a right *in personam.* The innocent pledgee of a chattel may, therefore, retain his pledge until the claim thereby secured is satisfied.[4] A pledge of title-deeds is as effectual as a pledge of any other chattel. Title-deeds are, it is true, so far an accessory of the title to the land as to pass with it to the grantee, although not mentioned in the deed of conveyance.[5] But they are not inseparably attached to the title. The owner of the land may sever them, if he will, and dispose of them as chattels.[6]

[1] Pilcher *v.* Rawlins, 7 Ch. 259; Ames, Cas. on Trusts, 531, n.

[2] White *v.* Garden, 10 C. B. 919; Kingsford *v.* Merry, 11 Ex. 577; The Horlock, 2 Pr. D. 243. The fact that a defrauded vendor of a chattel is allowed to maintain trover against the fraudulent vendee has given a certain currency to the opinion that the protection of an innocent purchaser of a chattel is due to the principle of equitable estoppel. See Moyce *v.* Newington, 4 Q.B. 32, 35, per Cockburn, C.J. Lindsay *v.* Cundy, 3 App. Cas., shows the fallacy of this opinion. In that case, B, fraudulently pretending that he was buying for M, induced A to consent to the sale to M, and to deliver the goods to himself. B then sold to C, an innocent purchaser. A prevailed against C, because the title had never passed from him. And yet there was as strong a basis for estoppel in this case as in those where the fraudulent vendee acquires a defeasible title. In truth, the fraudulent vendee who gets the title is a constructive trustee, and the action of trover against him presents the anomaly of a bill in equity in a court of common law.

[3] Y.B., 14 H. VIII. 4, pl. 5; Cas. on Trusts, 528, s. c.

[4] Pease *v.* Gloahec, L.R., 1 P.C. 219; Babcock *v.* Lawson, 4 Q.B.D. 394, 5 Q.B. Div. 284; Joseph *v.* Lyons, 15 Q.B. Div. 280; Hallas *v.* Robinson, 15 Q.B. Div. 288.

[5] Copinger, Title-Deeds, 2.

[6] Copinger, Title-Deeds, 4; Barton *v.* Gainer, 3 H. & N. 387, 388. See also the analogous cases of severance, by an obligee, of the document from the obligation. Chadwick *v.* Sprite, Cro. El. 821; Mallory *v.* Lane, Cro. Jac. 342; 2 Roll. Ab. 41 [G.2]; Gibson *v.* Overbury, 7 M. & W. 555; Barton *v.* Gainer, 3 H. & N. 387; Rummens *v.* Hare, 1 Ex. D. 169.

If, therefore, the owner of land, after creating an equitable incumbrance in favor of A, should subsequently give C an equitable mortgage by a deposit of the title-deeds, A could not compel the surrender of the deeds by C, if the latter had no notice of the prior incumbrance.[1] Nor has the Judicature Act affected the rights of such a pledgee.[2]

An honest purchaser will, furthermore, be protected, although he did not obtain the legal title at the time of his purchase, if he did acquire at that time an irrevocable power of obtaining the legal title upon the performance of some condition, and that, too, although, before performance of the condition, he received notice of the prior equitable claim. Thus, if a trustee, in violation of his duty, should sell the trust property to one who had no notice of the trust, and should deliver the deed in escrow, the defrauded *cestui que trust* could not restrain the innocent purchaser from performing the condition, nor could he obtain any relief against him after he had acquired the title.[3] On the same principle one who acquired at the time of his purchase an irrevocable power of obtaining the legal title upon the performance of some act by a third party, which that party is in duty bound to perform, will be as fully protected as if he had acquired the title itself at the time of his purchase. Hume *v.* Dixon[4] is a case in point. The owner of land subject to a vendor's lien sold it to an innocent purchaser; but, under the law of the State, the deed failed to convey the legal title, for the reason that the officer who took the acknowledgment of the deed forgot to sign his name thereto. He subsequently signed the deed, but after the grantee had notice of the lien. The purchaser was protected. Another illustration is furnished by Dodds *v.* Hills.[5] A trustee of shares in a company wrongfully pledged them, transferred the certificates, and executed a power to the innocent lender to register himself as owner of the shares. The transfer was registered after the lender was informed of the breach of trust.

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[1] Joyce *v.* De Moleyns, 2 J. & Lat. 374; Thorpe *v.* Holdsworth, 7 Eq. 139. Sir John Romilly's decision in Newton *v.* Newton, 6 Eq. 135, is, therefore, not to be supported. See, further, S. C. on appeal, 4 Ch. 143; Stackhouse *v.* Countess of Jersey, 1 J. & H. 721.

[2] Re Morgan, 18 Ch. Div. 93.

[3] Dodds *v.* Hills, 2 H. & M. 424, 427, per Wood, V. C.

[4] 37 Oh. St. 66. See also Buck *v.* Winn, 11 B. Mon. 320, 323.

[5] 2 H. & M. 424.

Wood, V. C., refused to deprive the lender of his security. There are similar decisions in Scotland and in this country.[1]

If the reasons suggested for protecting the purchaser of shares in a company are sound they would seem to furnish a solution of the vexed question as to the rights of the innocent purchaser of a chose in action from one who held it subject to what are called latent equities, *i.e.*, equities in favor of any person other than the obligor; for no solid distinction can be drawn between a transferree of shares, with a power to register himself as owner, and an assignee for value of a chose in action. The so-called assignee is not properly an assignee, *i.e.*, successor, but an attorney with a power to collect or dispose of the claim for his own use. He corresponds to the Roman *procurator in rem suam.* Both in the Roman and the Teutonic systems of law a contract was conceived of as a strictly personal relation. It was as impossible for the obligee to substitute another in his place as it would have been for him to change any other term of the obligation. This conception, rather than the doctrine of maintenance, is the source of the rule that a chose in action is not assignable. In 1 Lilly's Ab., 103, it is said: "A statute merchant, or staple, or bond, etc., cannot be assigned over to another so as to vest an interest whereby the assignee may sue in his own name, but they are every day transferred by letter of attorney, etc. Mich., 22 Car. B.R."[2] It was a consequence of the assignor continuing the legal

[1] Redfearn *v.* Ferrier, 1 Dow. 50; Burns *v.* Lawrie's Trustees (Scotch). 2 D. 1348; Brewster *v.* Sime, 42 Cal. 139; Thompson *v.* Toland, 48 Cal. 112; Winter *v.* Belmont, 53 Cal. 428; Atkinson *v.* Atkinson, 8 All. 15; McNeil *v.* Tenth Bank, 46 N. Y. 325. In Dodds *v.* Hills, it will be noticed, the lender was able to complete his title under the power without further assistance from the delinquent trustee. If the lender required the performance of some further act on the part of the trustee in order to complete his title, and if before such performance he received notice of the trust, the loss would fall upon him; for in the case supposed he could not obtain the title without making himself a party to the continuance of the breach of trust. Ortigosa *v.* Brown (47 L.J. Ch. 168) was decided in favor of a defrauded pledgor upon this distinction.

[2] See 2 Spence, Eq. Jur. 850; Pollock, Contracts, 206; 2 Bl. Com. 442 The wrong of maintenance lay in executing and exercising the power of attorney. The distinction was established at an early period, that the grant of a power of attorney to a creditor was not maintenance, while a similar grant to a purchaser or donee was maintenance. 34 H. VI. 30–15; 37 H. VI. 13–3; 15 H. VII. 2–3; South *v.* Marsh (1590), 3 Leon. 234; Harvey *v.* Beekman (1600), Noy, 52. As late as 1667–1672 the same distinction prevailed also in equity "The Lord Keeper Bridgman will not protect the assignment of any chose in action unless in satisfaction of some debt due to the assignee; but not when the debt or chose in action is assigned to one to whom the assignor owes nothing precedent, so that the assignment is voluntary or for money then given." Freem. C.C. 145.

owner of the obligation that he had the ability, though not the right, to destroy the assignee's right under the power of attorney; he had only to execute a release of the obligation, which would, of course, be a bar to any subsequent action by the assignee, in the assignor's name, against the obligor, even though the latter were a party to the wrong. Such a destruction of the assignee's right would be a tort, and a court of equity would, at the instance of the assignee, either restrain its commission or compel the assignor to surrender to the assignee whatever he had collected of the obligor. This is the real significance of the statements, sometimes made, that a power, though revocable at law, is irrevocable in equity, and that a chose in action is assignable in equity, although not assignable at law. In the absence of any actual or threatened tort the assignee of a chose in action was entitled to no relief in equity;[1] and for the simple reason that he could, by virtue of his power of attorney, enforce payment of his claim at common law. It seems clear, therefore, that, even though the assignor committed a breach of trust in granting to the assignee this power of reducing the chose in action to possession, a court of equity ought not to deprive him of it, if acquired by honest purchase. If this principle is sound in the case of an assignee whose power is only to sue in the name of the assignor, it applies *a fortiori* in favor of an assignee, who, by statute, is permitted to sue in his own name. The authorities are, however, hopelessly irreconcilable. In England the assignee finds no protection, whether the assignor was an express trustee[2] or a constructive trustee, *e.g.*, a fraudulent assignee.[3] In this country, on the other hand, as also in Scotland,[4] the assignee is, as a rule, protected from all latent equities[5] (except, of course, those in favor of the obligor). The English rule that the assignee takes subject to latent equities is followed in New York;[6] but a qualification is made in favor of an assignee whose assignor is himself an

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[1] Cator *v.* Burke, 1 Bro. C. C. 434; Hammond *v.* Messenger, 9 Sim. 327; Hayward *v.* Anderson, 106 U. S. 672; Walker *v.* Brooks, 125 Mass. 241.

[2] Moore *v.* Jervis, 2 Coll. 60; Brandon *v.* Brandon, 7 D., M., & G. 365; Cory *v.* Eyre, 1 D., J., & S. 149; Re European Bank, 5 Ch. 358.

[3] Cockell *v.* Taylor, 15 Beav. 103; Barnard *v.* Hunter, 2 Jur. n. s. 1213.

[4] Bell, Principles of Law (6 ed.), 637.

[5] Cas. on Trusts, 552–553.

[6] Schafer *v.* Reilly, 50 N.Y. 61; Trustees *v.* Wheeler, 61 N.Y. 88, and other cases cited in Cas. on Trusts, 552, n.

assignee under a written assignment procured by fraud.[1] This qualification is supposed to be an illustration of the principle of equitable estoppel. But an estoppel implies a variance between the real and the apparent fact. If, however, an assignment is a power of collection and substitution, it follows that in the case of a fraudulent assignment this essential feature of an estoppel is wanting. There is an identity between the real and the apparent fact. The fraudulent assignee not only purports to have, but actually has, the power of collection and substitution. He is in duty bound, it is true, not to exercise the power to the prejudice of his assignor; but his duty is the same as that which fastens upon the conscience of a fraudulent vendee of land not to convey the land to the detriment of the vendor. The decision in Moore *v.* Metropolitan Bank,[2] is therefore repugnant to the English rule which the courts in New York profess to follow.

In all the cases hitherto considered, the legal title, or other legal right of property, it has been assumed, was acquired at the time of the purchase. But he who advances money on the faith of a legal title that he already has, is equally entitled to protection. Thus, a first mortgagee, who makes subsequent advances in ignorance of a second mortgage, has priority as to those advances over the second mortgagee.[3] He is in the same position as if he had surrendered his first mortgage and taken a fresh conveyance of the legal estate to secure the whole of his advance. Newman *v.* Newman[4] illustrates the same principle. A *cestui que trust*, who had mortgaged his equity, released his interest to the trustee, who gave value without notice of the mortgage. The trustee, it was decided, could not be charged with the mortgage.

II. It is commonly said that, as between adverse equitable claimants, he who is prior in time is stronger in law, unless by his representation or conduct he has misled the later incumbrancer. But the rule, so stated, requires, at least in point of principle, an

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[1] Moore *v.* Metropolitan Bank, 55 N.Y. 41. In Barry *v.* Equitable Society, 59 N.Y. 587, an assignment procured by duress was distinguished, without sufficient reason, from one obtained by fraud.

[2] 55 N.Y. 41.

[3] Collet *v.* De Gols, Talbot, 65; Barnett *v.* Weston, 12 Ves. 130; Hopkinson *v.* Rolt, 9 H. L. C. 514 (*semble*); Truscott *v.* King, 2 Seld. 166; Cas. on Trusts, 542. The "tacking" in these cases is wholly distinct from that unjust tacking whereby a third mortgagee is permitted to buy up the first mortgage, and "squeeze out" the second.

[4] 28 Ch. D. 674.

important qualification, namely, that the equities of the adverse claimant must be immediate equities against the same person. There are many illustrations of the rule thus modified. For example, B, an express trustee for A, sells, without conveying the legal title, to C, who pays the purchase money without notice of the trust.[1] Or B makes an equitable mortgage to C.[2] Again, B, a fraudulent vendee, *i.e.*, a constructive trustee, of A, sells, without conveying the legal title, to C,[3] or gives him an equitable mortgage, or declares himself a trustee for him. In all these cases A and C have each an immediate equity against B. In all of them C must be postponed, because, in fact, no interest in the land passed to him by B's conveyances. B could not convey A's equitable interest as such, although he might have destroyed it by conveying the legal title, and he did not, as he might have done, convey his own legal interest.

But the rule as to conflicting equities, it is conceived, may be expressed more comprehensively. Just as the honest purchaser of a legal title from one who holds it subject to an equity acquires the legal title discharged of the equity, so also the purchaser of an equitable title from one who holds it subject to an equity takes the equitable title discharged of the equity. In all other cases the rule of priority governs, unless modified by the principle of estoppel. As the proposition here advanced has the merit, or, perhaps it should rather be said, the demerit, of novelty, it will be necessary to examine the true nature of an equitable right of property.

A *cestui que trust* is frequently spoken of as an equitable owner of the land. This, though a convenient form of expression, is clearly inaccurate. The trustee is the owner of the land, and, of course, two persons with adverse interests cannot be owners of the same thing. What the *cestui que trust* really owns is the obligation of the trustee; for an obligation is as truly the subject-matter of property as any physical *res*. The most striking difference between property in a thing and property in an obligation is in the mode of enjoyment. The owner of a house or a horse enjoys the fruits of ownership without the aid of any other person. The only

[1] Pinkett *v.* Wright, 2 Hare, 120; Att'y-Gen. *v.* Flint, 4 Hare, 147; Baillie *v.* M'Kewan, 35 Beav. 177; Wigg *v.* Wigg, 1 Atk. 384. See also Cas. on Trusts, 532–3.

[2] Shropshire Co. *v.* Queen L. R., 7 H. L. 496; Cas. on Trusts, 551, n. 1.

[3] Eyre *v.* Burmester, 10 H. L. C. 90, 103, per Lord Westbury; Peabody *v.* Fenton, 3 Barb. Ch. 451, 464–5, per Walworth, C. See also the analogous cases of bills of exchange, Cas. on Trusts, 533.

way in which the owner of an obligation can realize his ownership is by compelling its performance by the obligor. Hence, in the one case, the owner is said to have a right *in rem*, and, in the other, a right *in personam*. In other respects the common rules of property apply equally to ownership of things and ownership of obligations. For example, what may be called the passive rights of ownership are the same in both cases. The general duty resting upon all mankind not to destroy the property of another, is as cogent in favor of an obligee as it is in favor of the owner of a horse. And the violation of this duty is as pure a tort in the one case as in the other.[1]

The law of transfer is also the same for both forms of property. Take, for instance, the case of land. The owner may diminish his interest (1) by a transfer of the whole or an aliquot part of the land either permanently or for a time; (2) he may grant a rent charge issuing out of the land; or (3) he may charge himself with a trust or other equity in regard to the land. If, after diminishing his interest in either of the first two modes mentioned, he should make an ostensible conveyance of the whole land to an innocent purchaser, the latter would take only the diminished interest of his grantor; whereas, if he should make a similar conveyance after reducing his interest, in the third mode, the purchaser would take the legal title unincumbered. No reason occurs to the writer why a *cestui que trust* of land may not deal with his interest in the obligation of the trustee in a similar way, and with similar consequences. He certainly may transfer the whole or an aliquot part[2] of the obligation, and he may grant a rent charge issuing out of it[3] and he may also charge himself as trustee, or subject himself to any other equity in regard to the obligation. It is also true, that if the *cestui que trust*, after diminishing his interest by an assignment, should make an ostensible conveyance of his trust to an innocent purchaser, the latter would take subject to the previous

[1] From the nature of the case such a tort must be of rare occurrence. But instances may be put. B, a *cestui que trust*, assigns his trust to A, and afterwards, before the trustee is informed of the assignment, releases the trust to the trustee, as in Newman *v.* Newman, 28 Ch. D. 674. A's right against the trustee is destroyed. Again, suppose that C, a stranger, had maliciously incited B to make the release. A's claim against B and C would be for compensation for a purely equitable tort. Compare Lumley *v.* Gye, 2 E. & B. 216; Bowen *v.* Hall, 6 Q. B. Div. 333.

[2] Tierney *v.* Wood, 19 Beav. 330; Cas. on Trusts, 189. The obligation of a trustee is, from its nature, divisible, differing in this respect from most obligations.

[3] Phillips *v.* Phillips, 4 D., F., & J. 208; Cas. on Trusts, 433.

assignment.[1] Such a purchaser would also take subject to the annuity or rent charge.[2] Finally, if the *cestui que trust* should convey his trust after charging himself with a sub-trust, or other equity, the innocent purchaser ought to take the trust discharged from the sub-trust, or other equity, as in the corresponding case the purchaser acquires an absolute title to the land. The analogy between the two cases would seem to be perfect. The *cestui que trust* of the equitable obligation stands in the same relation to the owner of that obligation which the *cestui que trust* of the land occupies towards the owner of the land. Each has an immediate claim against his trustee; neither has a direct claim upon the subject-matter of the trust. Just as the *cestui que trust* of the land must work out his rights through the owner of the land, so the *cestui que trust* of the equitable obligation must work out his rights through the owner of the obligation. As the trustee of the land is complete owner of the land, subject to a duty in favor of the *cestui que trust* of the land, so the trustee of the equitable obligation is complete owner of the obligation, subject to a duty in favor of the *cestui que trust* of the obligation. The conclusion seems unavoidable, therefore, that as the ownership of the land may be transferred discharged of the duty in the one case, so the ownership of the equitable obligation may be transferred discharged of the duty in the other case. What is true of a sub-trust, or equity, created by the will of the owner of the equitable obligation must, obviously, be equally true of a sub-trust, or equity, created by operation of law. For example, if the owner of the equitable obligation were induced by fraud or duress to convey the obligation the fraudulent vendee would become the owner of it; but the law would raise a duty in him to deal with it for the benefit of the defrauded vendor, in other words, would make him a constructive trustee of the obligation in favor of the vendor; but if he should convey the obligation to a purchaser for value, without notice of the constructive trust, the purchaser could not properly be charged with it.

None of the decisions, it must be conceded, have proceeded upon

[1] Lee *v.* Howlett, 2 K. & J. 531; Cas. on Trusts, 428, 432, n. 1. An exception is made in the case of the transfer of equitable interests in personalty in England, and in a few States in this country, where the peculiar rule of Dearle *v.* Hall, 3 Russ. 48, obtains. But this decision, which was virtually a judicial creation of a registry law, has not met with much favor in this country. Putnam *v.* Story, 132 Mass. 205; Williams *v.* Ingersoll, 89 N. Y. 508, 523; Cas. on Trusts, 429.

[2] Phillips *v.* Phillips, 4 D., F., & J. 208; Cas. on Trusts, 433.

the principle herein advanced. Several of them, however, must be supported upon this principle, or else be pronounced erroneous. In Sturge *v.* Starr,[1] A, a *cestui que trust*, was induced by the fraud of B to sell her trust to C, a purchaser for value, without notice of the fraud. C was protected in his purchase. In Lane *v.* Jackson,[2] B, the owner of an equity of redemption, subject to an equity in favor of A, sold the equity of redemption to C, an innocent purchaser. A was not permitted to enforce his equity against C. Penny *v.* Watts[3] was a similar case, with a similar decision. To overrule these cases would be a misfortune.

On the other hand, in *Re* Vernon,[4] B, who held an equity of redemption in trust for A, sold it to C. The decision was in A's favor, on the ground of priority in time. In the court below, however, Bacon, V.C., found that C had notice of the trust, and the Court of Appeal disclaimed any dissent from this finding. In Cave *v.* Mackenzie,[5] an agent, acting for an undisclosed principal, contracted in his own name for the purchase of an estate, and then sold his right to call for a conveyance. The purchaser was deprived of the benefit of his purchase. In Daubeny *v.* Cockburn,[6] B, having a power to appoint a trust-fund to any of his children, which fund, in default of appointment, was to go to A, appointed the fund fraudulently to his daughter, M, in order to secure a personal advantage. M transferred the fund to C, an innocent purchaser. C was not permitted to keep the fund. Decisions like these, it is submitted, are powerful arguments against the doctrine of which they are a necessary consequence.

III. There were formerly two classes of cases in which a purchaser who had not acquired a right of property, either legal or equitable, was, nevertheless, allowed to plead purchase for value as a bar to the jurisdiction of a court of equity, on the ground that the plaintiff was seeking to deprive him of a common-law right, acquired as an incident of his purchase. One of these rights was the right of a defendant to refuse to testify in a court of common law. Bills for discovery against a purchaser for value were invariably dismissed, equity declining to strip the defendant of his common-law advantage.[7] A defendant had no right, on the

[1] 2 M. & K. 195.
[2] 20 Beav. 535.
[3] 2 DeG. & Sm. 501.
[4] 33 Ch. Div. 402; 32 Ch. D. 165.
[5] 46 L. J. Ch.
[6] 1 Mer. 626.
[7] Bassett *v.* Nosworthy, Finch, 102; Hoare *v.* Parker, 1 Bro. C. C. 578; Gomm *v.* Parrott, 3 C. B. n. s., 47.

other hand, to refuse to give evidence to be used in a court of equity. Accordingly, if a defendant failed to demur or plead to a bill for relief, but answered, he was bound to answer fully, although he were a purchaser for value without notice.[1]

The other right, of which a purchaser for value without notice could not be deprived, was the right to set up an outstanding satisfied term as a bar to an action of ejectment. It was not inequitable for him to insist upon an advantage which the policy of the law gave him, and accordingly purchase for value was a sufficient ground for dismissing a bill to restrain the defendant from setting up the term.[2] Both of these rights were accidental, and, with the change of the policy of the law, have ceased to exist, a defendant having been obliged to testify at law since 1851, and satisfied terms having been virtually abolished by the Satisfied Terms Act.

IV. Except in the cases mentioned in the preceding three sections a defendant can derive no advantage from the circumstance that he is a purchaser for value without notice. This will appear by an enumeration of the different classes of bills which have been sustained against such a purchaser. Bills of foreclosure, whether by a legal[3] or equitable[4] mortgagee; bills for partition;[5] for an account of tithes;[6] for the assignment of dower;[7] for the surrender of possession of chattels;[8] to have a paid judgment satisfied of record;[9] for the removal of a cloud upon a title;[10] for the cancellation of a void instrument;[11] for the perpetuation of testimony.[12] In none of the cases just mentioned was a court of

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[1] Lancaster *v.* Evors, 1 Phillips, 349, 352; Emmerson *v.* Ind., 33 Ch. Div. 323, 331; Langdell, Eq. Pl. (2 ed.), § 194.

[2] Goleborn *v.* Alcock, 2 Sim. 552; Langdell, Eq. Pl. (2 ed.), § 189. Mr. Langdell makes it clear that a bill to restrain the setting up of an outstanding term is not a bill belonging to the auxiliary jurisdiction. But, if the general principle of this essay is sound, the success of the defendant does not depend upon the nature of the jurisdiction invoked, but upon the possession of a right which the plaintiff seeks to take from him.

[3] Finch *v.* Shaw, 5 H. L. C. 905. [4] Frazer *v.* Jones, 5 Hare, 475, 172 J. Ch. 353.

[5] Snellgrove *v.* Snellgrove, 4 Dess. 274; Donald *v.* McCord, Rice Eq. 330. But see *contra*, Lyne *v.* Lyne, 21 Beav. 318.

[6] Collins *v.* Archer, 1 Russ & My. 284. [7] Williams *v.* Lambe, 3 Bro. C. C. 264.

[8] Jones *v.* Zollicoffer, 2 Tayl. 212; Brown *v.* Wood, 6 Rich. Eq. 155.

[9] Traphagen *v.* Lyon, 38 N. J. Eq. 613. [10] U.S. *v.* Southern Co., 18 Fed. Rep. 273; Gray *v.* Jones, 14 Fed. Rep. 83.

[11] Esdaile *v.* Lanauze, 1 Y. & C. Ex. 394; Vorley *v.* Cooke, 1 Giff. 230; Peabody *v.* Fenton, 3 Barb. Ch. 451 (*semble*).

[12] Dursley *v.* Berkeley, 6 Ves. 251, 263–4, *semble* per Lord Eldon. But see *contra*, Jerrard *v.* Saunders, 2 Ves., Jr. 454, 458, per Lord Loughborough.

equity called upon to deprive the defendant of any right of property. In all of them the right of property was in the plaintiff, who asked only for that assistance which equity regularly gives to owners of property.

In Attorney-General *v.* Wilkins[1] a plea of purchase for value was allowed to defeat a bill for the recovery of a rent. But this case would, doubtless, not be followed. An exception existed in the case of a bill by the legal owner of an estate for the surrender of the title-deeds. Wallwyn *v.* Lee.[2] This case was decided under the influence of the old view that equity would give no assistance against an innocent purchaser. And it would certainly have been a case of great hardship to the defendant if the decision had been adverse to him. For, it is highly probable, the plaintiff resorted to equity from inability to prove his title at law, and if he had succeeded he would, by an indirection, have got the evidence which he could not have obtained by a bill for discovery. The refusal of the court in several cases[3] to compel the surrender of title-deeds in foreclosure suits brought by a legal mortgagee after the plaintiff had proved his title is cause for surprise. But these cases have now lost their force, since, under the Judicature Act, the plaintiff gets in the foreclosure suit what formerly he would obtain only by a separate action at law.[4]

V. In cases where the rule of priority in time would otherwise determine the rights of adverse equitable claimants, it sometimes happens that the later incumbrancer subsequently acquires the outstanding legal title. Under what circumstance can he profit by the title so obtained? By the old law, if he gave value for his equity without notice of the prior equity, he was permitted to use the subsequently acquired title as *tabula in naufragio* under all circumstances, even though he gave nothing for the legal title, or obtained it with notice of the prior equity. This was an extreme application of the old rule, that equity would not exercise its jurisdiction against an honest purchaser. It was, however, long since decided that a later incumbrancer could derive no advantage from

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[1] 17 Beav. 285.

[2] 9 Ves. 24.

[3] Head *v.* Egerton, 3 P. Wms. 280; Kendall *v.* Hulls, 11 Jur. 864; Hunt *v.* Elmes, 2 D., F., & J. 578; Heath *v.* Crealock, 10 Ch. 22; Waldy *v.* Gray, 20 Eq. 238.

[4] Cooper *v.* Vesey, 20 Ch. Div. 611; Manners *v.* Mew, 29 Ch. D. 725.

an outstanding satisfied term got in with notice of the prior equity.[1] No case has been found where such a term was got in without notice of the prior equity. Sir George Jessel, M. R., put the case, however, in Mumford *v.* Stohwasser,[2] and expressed a strong opinion that the later equitable claimant could not use the term as *tabula in naufragio*, because, having acquired it as a volunteer, he could not honestly retain it.

The common illustration of the ancient rule is the English doctrine of tacking, whereby a third mortgagee, who advanced his money in ignorance of a second mortgage, is permitted upon discovering its existence to buy up the first mortgage, to tack his own to it, and so "squeeze out" the second.[3] This doctrine has found no support in this country,[4] and has been the subject of much adverse criticism in England.[5] Even if a third mortgagee should buy up the first mortgage, being still in ignorance of the second, he would not, upon principle, be entitled to priority over the second mortgagee. For, as he gave his money solely for the first mortgage, if he should be allowed to get anything more than that, he would get it for nothing, and could not, therefore, honestly keep it at the expense of the second mortgagee.[6]

It is possible, however, for a later equitable claimant, who has already paid his money, to obtain the legal title afterwards for

[1] Allen *v.* Knight, 5 Hare, 272, 11 Jur. 257; Carter *v.* Carter, 3 K. & J. 717; Prosser *v.* Rice, 28 Beav. 68, 74; Sharples *v.* Adams, 32 Beav. 213, 216; Baillie *v.* McKewan, 35 Beav. 177; Pilcher *v.* Rawlins, 7 Ch. 259, 268; Mumford *v.* Stohwasser, 18 Eq. 556; Cas. on Trusts, 534, n. 2.

[2] 18 Eq. 562. The same idea is expressed by the same Judge in Maxfield *v.* Burton, 17 Eq. 15, 19, and by North, J., in Garnham *v.* Skipper, 55 L. J. Ch. 263, 264.

[3] Marsh *v.* Lee, 1 Ch. Ca. 162; Bates *v.* Johnson, Johns. 304; Cas. on Trusts, 537, 541, n. 1.

[4] 1 Story, Eq. Jur. (12 ed.), §§ 413–419; 4 Kent (13 ed.), 177–179; Cas. on Trusts, 542.

[5] Bruce *v.* Duchess of Marlborough, 2 P. Wms. 491; Jennings *v.* Jordan, 6 App. Cas. 698, 714; West London Bank *v.* Reliance Society, 29 Ch. Div. 954, 961, 963. Under certain circumstances one who advances money upon the security of property, upon which two mortgages have already been given, is justly entitled to outrank the second mortgagee. For example, M has made a first mortgage for $5,000 to A, and a second mortgage for $ 5,000 to B. A desiring his money, M proposes to C that he shall advance $10,000, paying $5,000 to A, and taking a conveyance from him, and paying the other $5,000 to M. If C makes the advance of $10,000 in the manner suggested, and has no notice of B's mortgage, he may fairly claim priority over B. Peacock *v.* Burt, 4 L. J. Ch., n. s., 33, was such a case. This is not a case of tacking, nor of *tabula in naufragio*. The transaction is the same in substance as if A had reconveyed to M, and M had then made a legal mortgage for $10,000 to C. Carlisle Co. *v.* Thompson, 28 Ch. D. 398, was similar to Peacock *v.* Burt, except that C was not a mortgagee, but a purchaser.

[6] [See 4 HARV. LAW REV. 309, n. 3.]

value; and if he so obtains it, being still ignorant of the prior equity, he is as much entitled to protection as any other purchaser of a legal title. For example, if a trustee should, in violation of his trust, contract to sell the land to A, receiving the purchase money at the time, or should make an equitable mortgage by deposit of the title-deeds, and should afterwards, in discharge of his obligation, convey the legal title to A, the latter could not be charged with the prior equity;[1] for one who takes a legal title in discharge of a claim against the transferrer is a purchaser for value.[2] It follows, therefore, that these cases do not come within the doctrine of *tabula in naufragio*, and it may be fairly said that that doctrine survives only in the unjust and much-criticised English rule of tacking.

In conclusion, the results of the preceding pages may be summed up as follows: The purchaser of any right, in its nature transmissible, whether a right *in rem* or a right *in personam*, acquires the right free from all equities of which he had no notice at the time of its acquisition. This proposition, it is hoped, will find favor with the reader in point of legal principle. It can hardly fail to commend itself on the score of justice and mercantile convenience.

J. B. Ames.

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[1] Ratcliffe *v.* Barnard, 6 Ch. 652; Cooke *v.* Wilton, 29 Beav. 100; Leask *v.* Scott, 2 Q. B. Div. 376; Gibson *v.* Lenhart, 101 Pa. 522. But see *contra*, Barnard *v.* Campbell, 55 N. Y. 466, 58 N. Y. 73. But by the law of New York one who takes a title in payment of a debt is not considered to be a purchaser for value. Dickerson *v.* Tillinghast, 4 Paige, 215; Stevenson *v.* Brennan, 79 N. Y. 254.

[2] Taylor *v.* Blacklock, 32 Ch. D. 560; Merchants' Co. *v.* Abbott, 131 Mass. 397.